Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

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FLORANTE ORTALIZA, LINDA ORTALIZA
Petitioners

v.

GENERAL MILLS, INC.
Respondent

****

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in a wrongful termination action an employer's burden of production, on a summary judgment motion, of a legitimate business reason for termination is subject to the "directed verdict" standard and defeated by proof of an internal memorandum prepared by the employer which by its terms directly contradicts the employer's stated reason for the termination?

2. Regarding a summary judgment motion by an employer in a wrongful termination action, is a genuine issue of material fact created despite the employer's assertion of a legitimate reason for termination when the employee proves the existence of extensive personnel rules regarding termination and severance not followed by the employer, and the employer contends (a) that the rules are inapplicable because of disclaimers and abrogation of rules or, in the alternative, (b) that it did follow the subject termination and severance rules?

3. With respect to the "directed verdict" standard for ascertaining genuine issues of material fact on an employer's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 in a wrongful termination action, what degree of proof is required to establish a genuine issue regarding employment discrimination in response to a detailed motion filed by the employer?

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PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Florante Ortaliza, Linda Ortaliza respectfully petition for a writ of certiorari to review the judgment of the United States court of appeals for the ninth circuit in this case, as follows:

OPINIONS AND PROCEEDINGS BELOW

The case originally was filed in state court and removed by GMI to United States district court. The case was scheduled for trial beginning May 24, 1994. GMI filed its motion for summary judgment, noticed for hearing on May 2, 1994, and

the district court, the Hon. Manuel Real, granted GMI's motion. An appeal was taken to the ninth circuit court of appeals, and the court, in a memorandum certified for non-publication, affirmed the grant of summary judgment on the ground that plaintiff had not produced a "scintilla" of evidence to overcome the legitimate business reason for plaintiff's termination offered by GMI (Appendix, p. A-21, A-22).

The statement of uncontroverted facts and conclusions of law of the district court, dated May 2, 1994, (appendix *infra*, pp.A-5 to A-19) is unreported. The opinion of the court of appeals (appendix *infra*, pp. A-20 to A-26) is unreported. A petition for rehearing was denied on July 6, 1995 (appendix, p. A-27).

JURISDICTION

Jurisdiction of this Court is predicated under this Court's rule 10.1(a) recognizing the appropriateness of granting certiorari where the federal appellate decision has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a course by a lower court, as to call for the exercise of this Court's power of supervision. In addition, this case raises an important and significant question pursuant to California Government Code, § 12940(a), regarding proof of facts sufficient to create a genuine issue of employment discrimination, which section is substantially similar to Title VII of the Civil Rights Act of 1964, 78 Stat 255, 42 USC § 2000(e)-2(a)(1), discussed *infra*.

STATUTORY PROVISIONS INVOLVED

This case was originally filed in California state court and removed by the defendant to United States district court on the

basis of diversity of citizenship, Title 28, U.S.C. §§ 1332, 1441(a). Under the circumstances, California substantive law applies but the Federal Rules of Civil Procedure apply to the procedural aspects of the case, including the propriety of granting a motion for summary judgment, *Erie Railroad Co. v. Tomkins* (1938) 304 U.S. 64, Moore's Federal Practice, 1995 Pamphlet, § 6.6.

The case presents issues relating to Fed. Rule of Civ. Proc. 56, California Government Code, § 12940(a), and Title VII of the Civil Rights Act of 1964, 42 USC § 2000(e)-2(a)(1), see, Appendix, pp A-1 - A-4. Coverage by the California Government Code [Fair Employment and Housing Act] is virtually co-extensive with coverage by Title VII, *Espinoza v. Ferah Mfg. Co.* (1973) 414 U.S. 86; *Pejic v. Hughes Helicopters, Inc.* (1988, 9th Cir.) 840 F.2d 667; 29 CFR § 1606.1.

STATEMENT OF CASE

(1) General Mills, Inc.'s moving papers

The moving papers submitted by General Mills, Inc. ("GMI") took the position that plaintiff's termination from his employment in June, 1993, was a result of an ongoing re-structuring process that began in the mid-1980's, wherein quality control management of more than one flour mill was consolidated in a regional quality control manager, rather than having quality control managers at each of its flour mill facilities.

In 1993, GMI consolidated the quality control management of each of three western flour mills, located in Great Falls, Montana, Vallejo, California, Los Angeles, California into

regional quality control management. Before the re-structuring plaintiff, Florante Ortaliza, was the quality control manager at the Los Angeles facility, Herb Sanguinetti was the quality control manager at the Vallejo facility, and William Ramsey was the quality control manager at the Great Falls, Montana facility.

GMI's moving papers state that GMI "selected" Mr. Sanguinetti, the manager of its Vallejo facility, to be the regional quality control manager, stating the decision to use the Vallejo facility as the site of its west coast regional laboratory made, *inter alia*, "the selection of Mr. Sanguinetti over Mr. Ramsey [Great Falls, Montana facility] and F. Ortaliza [Los Angeles facility] more compelling" (emphasis supplied).

GMI's moving papers also set forth, with respect to personnel rules and severance pay, that (1) the said rules were not binding on GMI because of disclaimers, or (2) that GMI complied with its rules regarding plaintiff's termination and a severance offer made to plaintiff, which was rejected.

GMI's moving papers further deny that plaintiff's termination was the result of any form of discrimination, or that any GMI management employee either harbored discriminatory feelings against plaintiff or actually discriminated against him. The papers further state that plaintiff never complained about discrimination.

(2) Plaintiff's opposing papers

Plaintiff submitted through declarations, deposition testimony, and documentation obtained from GMI, as follows:

Plaintiff was born and raised in the Philippines, moved to the United States in 1966, and began his employment with

GMI in 1968. He spoke and wrote English fluently but was requested continuously, during his employment at General Mills, to speak and act as if he were culturally American born. Plaintiff had a degree in Chemical Engineering. In 1978 he became the quality control manager of the Los Angeles flour mill and remained in that capacity until his termination at age 51 in June, 1993.

In 1990 plaintiff had a serious verbal confrontation with the Los Angeles plant manager, Ron Copley, plaintiff's equal in terms of managerial status with GMI, wherein Copley angrily accused plaintiff of attempting to get Copley fired. Plaintiff believes that the confrontation was directly related to his efforts to effectively perform his duties as quality control manager, which often required conflict with the production side of the Los Angeles facility headed by Mr. Copley. All of the supervisors at the Los Angeles facility were white male, born in the United States.

From 1978 through 1992, plaintiff received yearly performance evaluations of his job as quality control manager at the Los Angeles facility of either excellent or good. In 1990, Mr. Larry Enfield, a white male born in the United States, working out of GMI's home office in Minneapolis, Minnesota, became plaintiff's immediate supervisor. During the space of one year, between 1991 and 1992, plaintiff's performance rating was down-graded by Enfield from good to marginal, with two performance evaluations taking place by Enfield during that time. After plaintiff's second evaluation in June, 1992, plaintiff complained in writing with no response made by GMI. News of his June 1992 evaluation became common knowledge among supervisors at the

Los Angeles facility. This began a course of conduct whereby other employees ignored plaintiff's evaluation and requests as quality control manager, with plaintiff complaining in writing to his supervisor of his managerial statements and requests being ignored and of harassment. Plaintiff unsuccessfully invoked a published conflict resolution process under personnel rules disseminated by GMI to all management employees. GMI never responded to his request.

Plaintiff had no advance notice that he was to be terminated on June 3, 1993. Based on contacts plaintiff had with William Ramsey, quality control manager at Great Falls, Montana facility, Ramsey was aware of his (Ramsey's) impending termination. The Los Angeles plant manager, Ron Copley, had advance notice of GMI's intent to terminate plaintiff but was specifically requested by plaintiff's supervisor, Enfield, not to tell plaintiff until Enfield personally terminated plaintiff, and told him to leave the premises within two hours on June 3, 1993. Based upon published and disseminated personnel rules regarding long time employees, plaintiff believed that if the quality control personnel at the Los Angeles facility was reduced to one, he would be the employee kept on because of a personnel rule that in case of reorganization, long service employees could replace employees of lesser years of service. Instead, GMI retained an employee, also Filipino, that plaintiff had hired himself earlier. Plaintiff also understood that GMI would conduct an indepth interview with a long service employee in the event of termination, including review of financial circumstances. At the time of his termination, due to a

bad family investment, plaintiff was going through bankruptcy. During discovery, GMI contended its personnel rules for long service employees were abrogated by a policy change in May, 1993. Plaintiff was never advised of this change before his termination.

The termination memorandum produced by GMI dated April 21, 1993 is entitled "Restructuring Sperry Plant Quality Control". The memorandum states, regarding the Los Angeles facility "Flor Ortaliza - QC Manager, has had unsatisfactory performance at this level and no vacant lower positions available" (emphasis supplied). The same memorandum states [regarding William Ramsey of the Great Falls, Montana facility] that Ramsey wanted information regarding a "retirement package".

REASONS FOR GRANTING THE PETITION

1. GMI failed to establish, within the standards applicable to a summary judgment motion, its initial burden of establishing a legitimate business reason for plaintiff's termination.

The criterion for determining whether a genuine issue of material fact exists on a summary judgment motion was set forth in *Anderson v. Liberty Lobby, Inc.* (1985) 477 U.S. 242, 250-252, with the court stating that the criterion is identical to the standard employed in determining whether a directed verdict should be granted, i.e., whether reasonable minds could differ on an issue

which could affect the outcome of the case.[1] Procedurally, the criterion on a summary judgment motion should be applied more stringently than on a directed verdict motion as the trial court on a summary judgment motion, unlike a directed verdict motion, has not had the opportunity to observe the demeanor of witnesses[2]. A district court must resolve facts contradicted by the non-moving party in favor of the non-moving party, *Lujan v. National Wildlife Federation*, (1990) 497 U.S. 871, 888.

In *Adickes v. S.H. Kress Co.* (1970) 398 U.S. 144, this Court reversed a summary judgment for the defendant because the materials supporting the motion failed to disprove an alleged conspiracy to deny civil rights. The holding of the *Adickes* decision makes clear that summary judgment is to be denied, even in the absence of a response, unless the moving party's showing is adequate in itself to justify the relief sought. This is referred to as sustaining the initial burden of production of evidence to establish that no genuine issue of material fact exists, *Anderson v. Liberty Lobby, Inc.* (1985) 477 U.S. 242, 250 ("Rule 56(e) provides that, when a properly supported motion for summary judgment is made... "); *Celotex Corp. v. Catrett* (1986) 477 U.S. 317, quoting *Adickes*, 477 U.S. at p.321 ("The party opposing the motion for summary judgment bears the burden of responding only after the moving party has met its burden of coming forward with proof of

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[1] A motion for directed verdict is now called a motion for judgment as a matter of law unde amended Fed. Rule Civ. P. 50.

[2] See, Thoughts on Directed Verdicts and Summary Judgment, by David P. Currie, University Chicago Law Review (1977), p. 72, 79 (fn).

the absence of any genuine issues of material fact."); *Lindahl v. Air France* (1991 9th Cir.) 930 F.2d 1434, 1438 ("She [non-moving party] must produce specific facts either directly evidencing a discriminatory motive or showing that the employer's explanation is not credible.") (emphasis supplied).

Applying the foregoing criteria to the issue of whether GMI satisfied its initial burden of producing a legitimate business reason for plaintiff's termination herein, the Court's attention is directed to GMI's stated position that plaintiff's termination was the result of a "conscious selection process" between three quality control managers contrasted with GMI's internal memorandum which establishes, due to the reference to plaintiff's poor performance at the quality control manager level, that plaintiff never had an opportunity to be selected as the regional quality control manager, despite GMI's statement otherwise. Applying the "directed verdict" standard to the question of whether GMI satisfied its initial burden of setting forth a legitimate business reason for plaintiff's termination, it is evident that there is a serious disparity between GMI's offered reason to the district court for plaintiff's termination and its own internal memorandum suggesting that he was terminated for reasons other than simply not having been selected. Thus, there is a serious and dramatic contradiction in GMI's own evidence which, according to the "directed verdict" standard, should have caused defendant's motion to be denied for that reason alone because defendant's internal memorandum, if believed, meant that plaintiff had no chance of becoming regional manager, contrary to GMI's statements under oath regarding the

"conscious selection process." Further, the mere existence of the impeaching memorandum by GMI is sufficient to create a genuine issue regarding GMI's state of mind in terminating plaintiff, affirmatively suggesting that GMI's motive may have been discriminatory, which coincidentally is plaintiff's position in this lawsuit, discussed *infra*.

This Court's decision, *St. Mary's Honor Center v. Hicks* (1993), 113 S. Ct. 2742, 125 L.Ed. 2d 407 concerned appellate review of a decision after a trial on the merits of a discrimination action, but is instructive herein because of extensive discussion in the opinion regarding the credibility of the employer's reason for termination of an employee after a trial on the merits. The majority opinion held that irrespective of the credibility of an employer's stated reason, i.e., even if the employee has proven that the employer was lying about its reason for termination, the employee must nevertheless also prove that the reason for termination was discriminatory.

Applying the *St. Mary's Honor Center* rationale to the instant case, what is the effect of the employee having disputed factually the employer's initial burden of production on a summary judgment motion, a process which can involve no credibility assessment, necessarily taking place prior to the evidence weighing exposure of a trial? Consistency with the safeguards against employer dishonesty discussed in the *St. Mary's Honor Center* decision provided by exposure to the trial process requires that the question of whether an employer has complied with its initial burden of production on a summary judgment motion should be

governed by a standard similar to the employee's obligation to establish genuine issues. If the employee has established specific facts which, if believed, would directly contradict the employer's stated reason, then the employer has not satisfied its initial burden and legitimately should be exposed to trial. The district court in the case and the court of appeal on *de novo* review, should have denied GMI's motion for that reason alone based upon proof by petitioners of GMI's internal memorandum, see Rule 56(e) ("If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party" (emphasis supplied)).

2. A genuine issue was raised for trial scrutiny regarding GMI's obligation to follow self-imposed rules regarding termination and severance, separate and apart from whether defendant had a legitimate business reason for terminating plaintiff.

In *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 254 Cal.Rptr. 211, 765 P.2d 373, the court upheld an employee's right to recover for contractual wrongful termination based upon expectations developed during the employment relationship considering numerous factors. The *Foley* court stated, 47 Cal.3d at p.680:

> "Pursuant to Labor Code, section 2922, if the parties reach no express or implied agreement to the contrary, the relation is terminable at any time, without cause. But when the parties have enforceable expectations concerning either the term of employment or grounds or manner of termination, Labor Code section 2922 does not diminish the force of such

contractual or legal obligations." (Emphasis supplied).

In the instant case plaintiff submitted in opposition to GMI's motion extensive written personnel rules, published and disseminated by GMI over a period of years to plaintiff which specified rules regarding termination and severance of long term employees. Pursuant to the "enforceable expectations" criterion of the *Foley* decision, based on numerous criteria such as longevity of service, performance evaluations, promotions, etc., a genuine issue of material fact was necessarily created in this case under the *Anderson v. Liberty Lobby, Inc.* "directed verdict" standard regarding whether such personnel rules were binding on GMI.

Plaintiff contended that he reasonably expected that those rules would apply to him, which included matters such as finding alternative employment within the company for him, replacing an employee with lesser service with the long term employee (GMI did just the opposite with plaintiff at the Los Angeles facility), conducting an indepth review of the employee's family and financial circumstances (plaintiff was going through bankruptcy at the time of his termination), and the offering of a severance package mutually agreed upon (GMI made a 'take it or leave it' offer). GMI denied that it was obligated by any of the personnel rules due to disclaimers or corporate policy change, contended that plaintiff was employed "at will" or, in the alternative, that GMI followed its own self-imposed rules. Based upon the evidence generated on the summary judgment motion, serious issues existed regarding whether GMI was obligated by its

own published and disseminated rules, and whether it followed same relating to plaintiff's termination. These issues existed separate and apart from whether GMI sustained its initial burden of setting forth a legitimate business reason for plaintiff's termination, discussed in the preceding section.

In contrast to the decisions cited in the court of appeal memorandum, *Clutterham v. Coachmen Industries, Inc.* (1985) 169 Cal.App.3d 1223, 215 Cal.Rptr. 795; *Joanou v. Coca-Cola Co.* (9th Cir. 1994) 26 F.3d 96, wherein the employees contended that a personnel obligation sought to be imposed on the employer was "consistent with or implied by" the employer's obligation to exercise good faith and fair dealing in the employment relation, in the instant case, GMI has specifically set forth in extensive detail what it considered to be required conduct on its part concerning termination and severance of long term employees. Under these circumstances, a genuine issue of material fact was created under the *Foley* decision for resolution by the trier of fact regarding GMI's obligation to follow its own self-imposed rules irrespective of whether GMI had a legitimate business reason for terminating plaintiff.

3. **The opposing papers, consistent with GMI's own evidence of an alternative reason for plaintiff's termination, set forth sufficient facts to raise a genuine issue of material fact regarding whether plaintiff's termination was caused by employment discrimination.**

In the *Celotex* decision, *supra*, this Court recognized that the moving party always bears the initial burden of establishing

the absence of a genuine issue of material fact, 477 U.S. at p.323. However, if the moving party complies with its initial burden and the non-moving party bears the burden of proof on an issue, the moving party need not support its summary judgment motion with evidence negating an essential element of the non-moving party's case to satisfy its burden. The moving party may simply point to the absence of evidence to support the non-moving party's case. The non-moving party must then "set forth specific facts showing that there is a genuine issue for trial", 477 U.S. at p.323, *Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 256.

As stated, GMI's own internal memorandum, dated April 21, 1993, construed most favorably to plaintiff, strongly suggests that plaintiff's termination was for reasons other than re-structuring to regional quality control management.

In *Schuler v. Chronicle Broadcasting Co.* (9th Cir. 1986) 793 F.2d 1010, relied upon by the ninth circuit in its memorandum opinion in the instant case, the court stated in a wrongful termination case that "The plaintiff must also offer specific and significantly probative evidence that the employer's alleged purpose is a pretext for discrimination...These subjective personal judgments do not raise a genuine issue of material fact," 793 F.2d at p.1011.

Comparing the *Schuler* criteria to this Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 250, 256, 257 and to Rule 56 itself, it is respectfully submitted that the ninth circuit has unreasonably increased the burden on the non-moving party beyond what should be required to successfully oppose a

summary judgment motion by an employer in a discrimination case. For example, the *Schuler* decision's use of the word "probative" appears to be foreign to the summary judgment procedure because it implies credibility analysis, which is prohibited in summary judgment rulings. The same comment pertains to the *Schuler* opinion's use of the words "subjective personal judgments" referring to the employee's opposition. Referring to a similar issue in the *Anderson v. Liberty Lobby, Inc.* decision, this Court stated, 477 U.S. at p.256, that a non-moving party cannot defeat a properly supported motion where state of mind is at issue "without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict." Significantly, Rule 56(e) uses the words "specific facts", not specific probative facts (emphasis supplied). Thus, this Court should clarify the potential distortion of the analytical standard on a summary judgment motion caused by the quoted statements made in the *Schuler* decision.

Using an analytical standard consistent with the decisions of this Court, reviewing the facts of the instant case, plaintiff's claim of discrimination has at all times been two-fold; namely, (1) that plaintiff's status as a quality control manager of a facility producing a product for consumption by the general public made his managerial evaluations and comments to his supervisor,

and to other supervisors and employees at the facility "protected conduct" under recognized California authorities, *Collier v. Superior Court* (1991) 288 Cal.App.3d 1117, 1119-1120 279 Cal.Rptr. 453; *Hentzel v. Singer Corp.* (1982) 138 Cal.App.3d 290 188 Cal.Rptr. 159, (2) plaintiff's status as a Filipino native working in an American culture. Plaintiff's position has been that these two factors combined together created a hostile employment environment for plaintiff, following his confrontation with plant manager, Copley, in 1990, directly leading to his termination after discriminatory down-grading of his performance evaluations after 14 years of good or excellent evaluations. A non-moving party may rely upon declarations, on the theory that a party is not required to depose his own witnesses, expressly recognized as applicable to summary judgment motions in the *Celotex* decision, 477 U.S., p.324. Herein, plaintiff's opposition through his own declaration and deposition testimony set forth a series of events beginning in 1990 which he cited as causing his discriminatory termination, e.g., his altercation with plant manager, Copley, the sudden down-grading of his performance evaluations, his supervisor speaking privately with other individuals, his being ignored, his complaining about the foregoing, his unsuccessful attempt to invoke conflict resolution within the company, his status as a manager supervising others being ignored, *inter alia*. Query: can the foregoing explanation alternative to GMI's stated reason for plaintiff's termination but directly suggested by GMI's own termination memorandum be ignored consistent with the directed verdict standard? Plaintiff's presentation went far beyond his own

subjective assessment of events, and included documentation and detailed facts. As recognized by this Court in the *St. Mary's Honor Center v. Hicks* decision (1993), 113 S. Ct. 2742, 125 L.Ed. 2d 407, quoting another decision:

> "There will seldom be eyewitness testimony as to the employer's mental processes."

CONCLUSION

The questions presented are new and important.

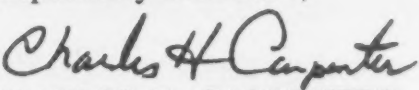
Petitioners respectfully submit that this case, currently buried in the obscurity of a memorandum certified for non-publication, not only was wrongly decided by a wide margin, but also raises significant issues for this Court to resolve regarding the standards applicable to a summary judgment motion, regarding the applicability of a national employer's personnel rules regarding termination and severance, and regarding proof of discrimination on paper under summary judgment circumstances.

The primary litigation regarding Rule 56 motions to date before this Court have concerned minimum requirements for granting motions in the face of the non-moving party's reliance on pleading allegations, or discovery incapacity. With the proliferation of Rule 56 motions based upon the recognition of Rule 56 as an "integral part" of the federal system, the instant case raises new and different questions regarding appropriate standards for opposing a motion by detailed factual and evidentiary opposition, with evidence contradicting the moving party's initial burden of production and

evidentiary objections to the moving party's proffered evidence. The failure of the district court and court of appeal to address these questions raises serious questions regarding the petitioners being deprived of their right to a trial on the merits, and a jury trial.

Wherefore, it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,



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APPENDIX

Federal Rule of Civil Procedure No. 56 states:

Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make

an order specifying the facts that appear without substantial controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to be the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

California Government Code, Section 12940 provides in relevant part:

> "It shall be an unlawful employment practice, unless based upon a bonafide occupational qualification, or except where based upon applicable security regulations established by the United States or the State of California:
>
> (a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of any person to refuse to hire or employ the person, or to refuse to select the person for a training program leading to employment, or to bar to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges or employment."

Title VII of the Civil Rights Act of 1964, 42 USC, § 2000(e)-2(a)(1) provides:

Unlawful employment practices.

(a) Employer practices

It shall be an unlawful employment practice for an employer-

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;"

29 Code of Federal Regulations, § 1606.1 states:

"The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's or his or her ancestors' place of origin; or because an individual has the physical, cultural, or linguistic characteristics of a national origin group."

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Entered
Clerk, U.S. District Court
May 5, 1994

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

FLORANTE ORTALIZA; LINDA ORTALIZA, Plaintiffs, v. GENERAL MILLS, INC., Defendant,	D.C. No. CV-93-06106-R DEFENDANT'S STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

After consideration of the papers in support of and in opposition to Defendant's Motion for Summary Judgment or in the alternative, for Partial Summary Judgment, and the oral argument of counsel, the Court determines that the following facts have been established as,

//

Court stamp: THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

UNCONTROVERTED FACTS

1. F. Ortaliza's position as Quality Control Manager at GMI's Vernon, California facility was eliminated as a result of an on-going major restructuring of GMI's businesses, in general, and its quality control operations, in particular.

(Schwecke Depo., 7:19-9:21, attached to Youmans Decl.).

2. GMI eliminated the position of Quality Control Manager at each of its three small mills within its Gold Medal, (then called Sperry) Division.

(Armstrong Decl., ¶ 5, attached to Youmans Decl.)

3. Other positions within each mill's respective quality control department also were eliminated.

(Armstrong Decl., ¶ 5, attached to Youmans Decl.; Bindgen Decl., ¶¶ 2, 4, 5, attached to Youmans Decl.)

4. None of the individuals, including F. Ortaliza, who lost their jobs as a result of the restructuring was replaced.

(Armstrong Decl., ¶ 5.)

5. F. Ortaliza was told that his position was eliminated and his employment terminated because of this organizational restructuring.

(F. Ortaliza Depo. 86:12-17, 188:4-13, 189:2-6, 426:21-427:9, 437:1-11, attached to Youmans Decl.)

6. F. Ortaliza, under penalty of perjury and in an effort to secure unemployment insurance benefits soon after his termination, informed California's Economic Development Department that he had been terminated as a result of a reorganization.

(F. Ortaliza Depo. 427:24-428:2; Armstrong Decl., ¶ 11, Ex. 1.)

7. The restructuring entailed essentially two developments: transferring quality control tasks (e.g., testing) to manufacturing operators and essentially replacing laboratories located within each mill with strategically located regional laboratories.

(Enfield Decl., ¶ 3; Schwecke Decl., ¶ 3.)

8. The first development lead directly to the reduction of quality control department hourly personnel from two individuals to one individual at the Vernon facility. Thus, F. Ortaliza's supervisory responsibilities, had he been retained, would have been reduced by fifty percent (50%).

(Enfield Decl., ¶ 6; Armstrong Decl., ¶ 5.)

9. The sole individual retained in the quality control department at the Vernon facility is Filipino.

(Enfield Decl., ¶ 8.)

10. The creation of a single west coast regional laboratory lead directly to the consolidation of much of three west coast Quality Control Managers' responsibilities into the hands of one Quality Control Manager who was retained.

(Enfield Decl., ¶ 8; Schwecke Decl., ¶ 6.)

11. Among the three managers involved, GMI selected Herb Sanguinetti, the long term manager at its Vallejo, California large mill facility as the Regional Quality Control Manager. Herb Sanguinetti formerly supervised F. Ortaliza and had been employed with GMI at the time of the restructuring for a longer period of time than had been F. Ortaliza. (Enfield Decl., ¶ 9.)

12. William Ramsey, the Quality Control Manager at GMI's small mill facility in Great Falls, Montana who also was impacted adversely by the restructuring, had a longer tenure with GMI than F. Ortaliza. Ramsey is of U.S. national origin.

(Enfield Decl., ¶ 8; Armstrong Decl., ¶ 5.)

13. GMI selected its Vallejo Facility to be the site of its west coast regional laboratory because (1) a greater use of the regional laboratory would be devoted to testing that facility's raw materials and product; (2) the Vallejo facility was centrally located; and (3) it had a quality control engineer on-site whose services would be particularly important in the new regional laboratory configuration.

(Enfield Decl., ¶ 10; Schwecke Decl., ¶ 8.)

14. The decision to use Vallejo as the site of its west coast regional laboratory made the selection of Mr. Sanguinetti over Mr. Ramsey and F. Ortaliza more compelling.

(Enfield Decl., ¶ 9; Schwecke Depo., ¶ 7.)

15. The business purposes of the transformation were both to raise the quality of GMI's products and to best ensure that 'we do it right the first time.'

(Schwecke Depo. 7:19-9:21, attached to Youmans Decl.)

16. F. Ortaliza does not take issue with the wisdom of a so-called operator control-based quality assurance program.

(F.Ortaliza depo. 119:11-120:7, 122:15-22.)

17. F. Ortaliza informed his superior prior to the restructuring that he had too many employees in his group.

(F. Ortaliza Depo. 119:19-120:7.)

18. F. Ortaliza recognized the right of GMI, in particular, and of a company, in general, to reorganize, and understood that employees often lose their jobs as a result of such reorganization. (F. Ortaliza Depo. 345:13-25.)

19. F. Ortaliza had experienced and survived a reduction-in-force at the Vernon facility a few years prior to his termination that cut the workforce at the facility by fifty percent (50%), as well as other smaller workforce reductions.

(F.Ortaliza Depo. 345:13-25.)

20. F. Ortaliza was aware of the intractable nature of the movement that had taken place in the direction of consolidating quality control operations for approximately one and one-half (1½) years prior to his termination. He knew, as well, that such developments ultimately would trigger a reduction-in-workforce.

(F. Ortaliza Depo. 87:2-25, 119:2-10; 121:17-122:22.)

21. GMI made comparable changes at its two east coast small mill operations with the same consequences (i.e., elimination of managerial positions) prior to replicating those changes at its west coast small mills, located in Vernon and Great Falls, Montana.

(Enfield Decl., ¶ 6.)

22. In other areas of its business, GMI had commenced the process of moving to operator control-based quality assurance programs as far back as the mid-1998's.

(Schwecke Depo. 7:19-9:21)

23. Larry Enfield, F. Ortaliza's immediate supervisor at the time of his termination, never said anything that represented a bias towards F. Ortaliza because of his national origin.

(F. Ortaliza Depo. 155:12-15; Enfield Decl. ¶ 15)

24. Warren Schwecke, GMI's Vice-President for Consumer Foods-Quality Control, never made a disparaging remark toward to about F. Ortaliza's ethnicity.

(F. Ortaliza Depo. 155:16-19; 250:16-261:3;
Schwecke Decl., ¶ 12)

25. No one associated with GMI ever said anything that reflected a bias toward F. Ortaliza or someone of his national origin. (F. Ortaliza Depo., 155:16-9, 250:16-251:3)

26. F. Ortaliza believes that the worst thing that happened to him during his employment with GMI involved an isolated incident when the Vernon facility's general manager, Ron Copley, angrily pounded on his desk punctuating his anger over some issue that F. Ortaliza no longer recalls with any specificity. F. Ortaliza does not believe that the incident was sparked by a bias against him because of his national origin.

(F. Ortaliza Depo., 294:17-296:19; 303:19-25)

27. F. Ortaliza never reported, or even threatened to report, any violation of a government-imposed quality standard to anyone outside GMI.

(Enfield Decl., ¶ 13; Schwecke Decl., ¶ 11)

28. During F. Ortaliza's employment, the Vernon facility was never cited by a government agency for a violation of any code, standard, or regulation, although it was inspected regularly by such agencies.

(F. Ortaliza Depo. 331:7-334:9, 340:9-342:8)

29. F. Ortaliza routinely made reports to his superior and to the Vernon facility general manager regarding quality-related issues without incident and without interference throughout his employment.

(F. Ortaliza Depo. 306:23-308:15)

30. F. Ortaliza's superiors never criticized, chastised or otherwise made negative comments about the substance or fact of his quality inspection reports, nor did they ever tell him to cease and desist from making such reports.

(F. Ortaliza Depo. 306:23-308:15, 307:25-308:2)

31. F. Ortaliza does not believe that his termination was caused in whole or in part by his complying wit his obligations as a quality control manager to make inspection reports to his superior.

(F. Ortaliza Depo. 309:1-9)

32. The employment application F. Ortaliza completed specifically stated that his employment would be terminable-at-will.

(Armstrong Decl., ¶ 12, Ex. 10)

33. GMI Corporate Policy Statement, No. CP-5, "Termination of Employment," which was distributed to managers, expressly states that "[e]mployment at GMI is at the will of the company." (Armstrong Decl. ¶ 13, Ex. 122)

34. The "Management Guidebook," which was distributed to managers for the purpose of providing guidance to them in implementing the Corporate Policy Statements, states that GMI "has the right to terminate an employee for any reason at any time."

(Armstrong Decl., ¶ 14, Ex. 101)

35. The first page of the "Management Guidebook" contains the following explicit language: "These policies are not intended as a contract of employment and they do not in any way affect the company's right to terminate an employee for any reason at any time, nor do they affect the employee's right to leave the company at any time."

(Armstrong Decl., ¶ 14, Ex. 101)

36. F. Ortaliza never received anything in writing nor was he told anything regarding the bases or circumstances under which his employment could be terminated or that he would not be terminated arbitrarily.

(F. Ortaliza Depo, 485:2-486:25)

37. Mr. Enfield and Deb Armstrong, Director of Personnel for the Gold Medal Division of GMI, sought alternative employment within the company for F. Ortaliza, but found none, due in part to the general constricting of GMI's workforce at the time, particularly within its various quality control departments.

(Enfield Depo. 15:18-16:4, 17:22-18-3, 27:2-19; Schwecke Decl., ¶ 10; Schwecke Depo, 31:12-32:9; Armstrong Depo. 19:16-20:6; Armstrong Decl., ¶ 8; Enfield Decl., ¶ 12; Bindgen Decl., ¶ 3)

38. Mr. Enfield told F. Ortaliza at the time of his termination that he had attempted to find another position for him with GMI. (Ortaliza Depo. 86:12-17, 188:4-13, 189:2-6, 426:21-427:9, 437-1:11)

39. F. Ortaliza has no information that would indicate that a search to find him another position did not take place.

(Ortaliza Depo. 359:24-360:12, 437:12-21)

40. F. Ortaliza does not know of a single position within GMI that was vacant for which he was qualified at the time of his termination.

(Ortaliza Depo. 190:20-191:3, 192:4-8, 193:15-194:3)

41. F. Ortaliza does not contend that GMI had an obligation to displace or "bump" an incumbent employee to accommodate him. (Complaint ¶¶ 18-24; Ortaliza Depo. 357:19-358:23, 360:13-19)

42. It has never been the practice of GMI to permit "bumping" in the context of a reduction in force.

(Schwecke Depo. 29:18-30:6; Enfield Depo. 24:12-26:4; Armstrong Decl., ¶ 7; Bindgen Decl., ¶ 3)

43. No policy or guideline obligates GMI to bump employees. (Armstrong Decl. ¶¶ 7, 14, 15, Ex. 6; Bindgen Decl.¶3)

44. Consistent with GMI's practice, F. Ortaliza's compensation was continued for two months after he was notified to stop performing work for GMI and that his employment would be terminated. Moreover, he was offered a special service allowance, the value of which approximated $150,000 and included an outplacement service component. (Armstrong Decl. ¶ 10)

45. F. Ortaliza has not seen a psychiatrist, psychologist, or medical doctor as a result of anything that occurred during his employment, or as a result of his termination.

(Ortaliza Depo. 453:18-454:6)

46. The purported medical conditions F. Ortaliza has experienced subsequent to his termination are conditions that he has

endured during the twenty four (24) years preceding his termination. (Ortaliza Depo, 454:7-456:23)

Based on the foregoing Uncontroverted Facts, the Court now makes its,

CONCLUSIONS OF LAW

Under the foregoing standard, F. Ortaliza cannot establish a *prima facie* case of national origin discrimination because, as discussed previously, the undisputed evidence establishes that:

1. F. Ortaliza's first cause of action for discrimination based on his national origin in violation of Government Code § 12920 *et seq.* fails because F. Ortaliza cannot establish a *prima facie* case: (1) F. Ortaliza was terminated because his position as Quality Control Manager at GMI's Vernon facility was terminated, (2) prior to his termination F. Ortaliza was the only Quality Control Manager at the Vernon facility, and (3) since his termination no one has assumed his former position, or any similar position, at GMI's Vernon facility. It also fails because GMI had a legitimate, non-discriminatory reason for terminating his employment, i.e., a restructuring of its quality control operations, and F. Ortaliza does not have sufficient evidence to demonstrate that this reason was pretextual, or to prove that his national origin was the true reason for his termination. *Mixon v. Fair Employment & Housing Commission*, 193 Cal.App.3d 1306, 1318, 237 Cal.Rptr. 884 (1987); *Gay v. Waiters' and Dairy Lunchman's Union*, 694 F.2d 531, 555 (9th Cir. 1982); *St. Mary's Honor Center v. Hicks* __U.S.__ 113 S. Ct. 2742, 2752 (1993); *Nolan v. Cleveland*, 686 F.2d 806, 812 (9th Cir. 1982).

2. F. Ortaliza's second cause of action for wrongful termination in violation of public policy fails because his claim is not tethered, as it must be, to a fundamental policy delineated in a constitutional or statutory provision. *Gantt v. Sentury Insurance*, 1 Cal. 4th 1083, 4 Cal.Rptr. 874 (1992). It fails also because GMI had a legitimate, no-retaliatory reason for terminating him, as indicated above, and F. Ortaliza does not have sufficient evidence to demonstrate that this reasons was pretextual, or to prove that the real reason for his termination constituted an impermissible retaliation against him in violation of public policy. *Mixon v. Fair Employment & Housing Commission* 192 Cal.App.3d 1306, 1318, 237 Cal.Rptr. 884 (1987); *St. Mary's Honor Center v. Hicks*, __U.S.__, 113 S. Ct. 2742, 2752 (1993).

3. F. Ortaliza's third cause of action for breach of an implied-in-fact covenant not to terminate him without good cause fails because he does not have sufficient evidence, as matter of law, to support the existence of such a covenant or to rebut the statutory presumption that his employment was terminable-at-will. Moreover, GMI, nonetheless, had good cause to terminate him as a result of the referenced restructuring. *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 677, 265 Cal.Rptr. 211 (1988); *Fowler v. Varian Associates, Inc.* 196 Cal.App.3d 42-43, 241 Cal.Rptr. 539 (1987); *Pugh v. See's Candies, Inc.*, 116 Cal.App.3d 311, 330, 171 Cal.Rptr. 917 (1981); *Wilkerson v. Wells Fargo Bank*, 212 Cal.App.3d 1217, 1230, 261 Cal.Rptr. 185 (1989); *Clutterham v. Coachman Industries, Inc.*, 169 Cal.App.3d 1223, 1227, 215

Cal.Rptr. 795 (1985); *Gianaculas v. Tans World Airlines, Inc.*, 761 F.2d 1391, 1395 (9th Cir. 1985).

4. F. Ortaliza's third cause of action which also contains a claim for breach of contract by GMI in allegedly failing to seek alternative employment for F. Ortaliza within GMI when his position was eliminated fails because he does not have sufficient evidence, as a matter of law, to support a finding of the existence of such a contractual obligation, and GMI, nonetheless, did seek alternative employment with GMI for him at or about the time of his termination. *Hillsman v. Souter Community Hospitals*, 153 Cal.App.3d 743, 753, 200 Cal.Rptr. 605 (1984); *Crane v. Burroughs Corp.*, 560 F.Supp.849, 852 (C.D. Cal. 1983); *Dell v. Montgomery Ward & Co.*, 811 F.2d 970, 972-74 (6th Cir. 1987).

5. F. Ortaliza's fourth cause of action for breach of the covenant of good faith and fair dealing fails because his employment was terminable-at-will, and his termination consistent with that principle does not violate the implied-by-law covenant, and because GMI, nonetheless, at all times acted in good faith and fairly as measured against any contractual obligations it had with respect to F. Ortaliza. *Comeaux v. Brown & Williamson Tabacco Company*, 915 F.2d 1264, 1272 (9th Cir. 1990); *Foley*, 47 Cal.3d at 698 n.39; *Hejmadi v. AMFAC, Inc.*, 202 Cal.App.3d 525, 542-49, 249 Cal.-Rptr. 5 (1988).

6. F. Ortaliza's fifth cause of action for intentional infliction of emotional distress fails because (1) it is barred by the exclusive remedy provisions of the California Workers' Compensation Act; (2) it may not be properly brought if the underlying claim

is dependent essentially on facts grounded on his wrongful termination claims; (3) GMI's conduct was not extreme and outrageous; and (4) F. Ortaliza did not suffer severe emotional distress. *Cole v. Fair Oaks Fire Protection District*, 43 Cal.3d 148, 160, 233 Cal.-Rptr. 308 (1987); *Shoemaker v. Meyers*, 52 Cal.3d 1, 25, 276 Cal.Rptr. 303 (1990); *Livitsanos v. Superior Court*, 2 Cal.4th 744, 7 Cal.Rptr.2d 808 (1992); *Hunter v. Upright, Inc.*, 6 Cal.4th 1174, 1185, 26 Cal.Rptr.2d 8 (1993); *Soules v. Cadam, Inc.*, 2 Cal.-App.4th 390, 3 Cal.Rptr.2d 6 (1991); *Kiseskey v. Carpenters' Trust for So. Cal.*, 144 Cal.App.3d 222, 229, 192 Cal.Rptr. 492 (1983); *Agarwal v. Johnson*, 25 Cal.3d 932, 946, 160 Cal.Rptr. 521 1979); *Marlene F. v. Affiliated Psychiatric Medical Clinic*, 48 Cal.3d 583, 590-91, 257 Cal.Rptr. 98 (1989); *Fuentes v. Perez*, Cal.App.3d 163, 172, 137 Cal.Rptr. 275 (1977); *Cervantes v. J.C. Penney Company*, 24 Cal.3d 579, 593, 156 Cal.Rptr. 198 (1979); *Yurick v. Superior Court*, 209 Cal.App.3d 116, 1129-30, 257 Cal. Rptr. 665 (1989); *Crane v. Burroughs Corp.* 560 F.Supp. 849 (C.C.Cal. 1983); *Fletcher v. Western National Life Ins.*, 10 Cal. App.3d 376, 397, 89 Cal.Rptr. 78 (1970).

7. F. Ortaliza's sixth cause of action for negligent infliction of emotional distress fails because (1) it is barred by the exclusive remedy provisions of the California Workers' Compensation Act; (2) it may not be properly brought if the underlying claim is dependent essentially on facts grounded in his wrongful termination claims; (3) GMI had no duty to refrain from negligence in terminating his employment; and (4) F. Ortaliza did not suffer severe emotional distress. *Cole v. Fair Oaks Fire Protection*

District, 43 Cal.3d 148, 160, 233 Cal.Rptr. 308 (1987); *Shoemaker v. Myers*, 52 Cal.3d 1, 25, 276 Cal.Rptr. 303 (1990); *Livitsanos v. Superior Court*, 2 Cal.4th 744, 7 Cal.Rptr.2d 808 (1992); *Hunter v. Upright, Inc.*, 6 Cal.4th 1174, 1185, 26 Cal.Rptr.2d 8 (1993); *Soules v. Cadam, Inc.*, 2 Cal.App.4th 390, 3 Cal.Rptr.2d 6 (1991); *Kiseskey v. Carpenters' Trust for So. Cal.*, 144 Cal.App.3d 222, 229, 192 Cal.Rptr. 492 (1983); *Agarwal v. Johnson*, 25 Cal.3d 932, 946, 160 Cal.Rptr. 521 (1979); *Marlene F. v. Affiliated Psychiatric Medical Clinic*, 48 Cal.3d 583, 590-91, 257 Cal.Rptr. 98 (1989); *Yurick v. Superior Court*, 209 Cal.App.3d 1116, 1129-30, 257 Cal.Rptr. 665 (1989); *Fletcher v. Western National Life Ins.*, 10 Cal.App.3d 376, 397, 89 Cal.Rptr. 78 (1970); *Wilson v. Vlassic Foods*, 116 L.R.R.M. (BNA) 2419 (C.D. Cal. 1984).

8. L. Ortaliza's claim for loss of consortium, which represents the seventh cause of action, fails because (1) it is barred by the exclusive remedy provisions of the California Workers' Compensation Act; (2) GMI did not commit a tortious act toward F. Ortaliza upon which L. Ortaliza can base her claim; and (3) F. Ortaliza did not suffer severe physical or psychological injury. *Bell v. Macy's of California*, 212 Cal.App.3d 1442, 1456, 261 Cal.Rptr. 447 (1989); *Colombo v. State of California*, 3 Cal.App.4th 594, 599, 2 Cal.Rptr.2d 567 (1991); *Cole v. Fair Oaks Fire Protection District*, 43 Cal.3d 148, 160, 233 Cal.Rptr. 308 (1987); *Shoemaker v. Myers*, 51 Cal.3d 1, 276 Cal.Rptr. 30 (1990); *Anderson v. Northrop Corp.*, 203 Cal.App.3d 772, 780-81, 250 Cal.Rptr. 189 (1988).

9. Accordingly, under Rule 56(c) of Federal Rules of Civil Procedure, summary judgment in favor of GMI is appropriate because there is "no genuine issue as to any material fact" and GMI is "entitled to judgment as a matter of law" on all of plaintiffs' alleged claims against it, specifically, the first, second, third, fourth, fifth, sixth and seventh causes of action.

DATED: May 2, 1994

Manuel L. Real
UNITED STATES DISTRICT JUDGE

Court stamp: FILED
May 24, 1995
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FLORANTE ORTALIZA; LINDA ORTALIZA,	)	Nos. 94-55758, 94-56304
	)	D.C. No. CV-93-06106-R
Plaintiffs-Appellants,	)	MEMORANDUM[1]
v.	)	
GENERAL MILLS, INC.,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, Chief District Judge, Presiding

Argued and Submitted May 1, 1995
Pasadena, California

Before: FLETCHER, BRUNETTI, and T.G. NELSON, Circuit Judges.

1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Florante and Linda Ortaliza appeal the grant of a summary judgment motion dismissing Florante's claims of wrongful termination and intentional and negligent infliction of emotional distress. They also appeal the award of attorney fees to General Mills, Inc. (GMI).

The Ortalizas originally filed their suit in state court in California. GMI successfully removed the case to federal court based on the diversity of the parties pursuant to 28 U.S.C. §§ 1441(a) and 1332. We, therefore, must apply California law to the state claims asserted. We have jurisdiction pursuant to 28 U.S.C. § 1291.

I

We review a grant of summary judgment *de novo*. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). Our review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). We must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient. "[T]here must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

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II

Ortaliza's wrongful discharge claims, including breach of the covenant of good faith and fair dealing and his claim that his termination was a form of discrimination based on his national origin, fail because he is unable to overcome the legitimate business reason for the termination proffered by GMI. GMI has undergone a restructuring of its Quality Control Department. This downsizing has been on-going for a number of years. California and the Ninth Circuit have recognized that a dismissal due to a reduction in force constitutes a "good cause" for termination. See, *Gianaculus v. Trans World Airlines, Inc.*, 761 F.2d 1391, 1395 (9th Cir. 1985) ("[T]he evidence indicates that appellants were furloughed as part of a general reduction in TWA's management work force . . . appellants were not, therefore, dismissed without god cause.") *Clutterham v. Coachmen Indus., Inc.*, 215 Cal.Rptr. 795, 796 (Cal. Ct. App. 1985) ("[R]espondent had shown that there was good cause for termination due to the depressed conditions in the industry and the relocation of corporate operations."); see, also, *Joanou v. Coca-Cola Co.*, 26 F.3d 96, 99-100 (9th Cir. 1994) ("Courts must take care not to interfere with the legitimate exercise of managerial discretion." (internal quotation omitted)).

Furthermore, Ortaliza has failed to present "specific and significantly probative evidence that the employer's alleged purpose is a pretext for discrimination." *Schuler v. Chronicle Broadcasting Co.*, 793 F.2d 1010, 1011 (9th Cir. 1986).

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III

A prima facie case of intentional or negligent infliction of emotional distress in California consists of three elements: (1) extreme and outrageous conduct by the defendant; (2) the plaintiff suffering extreme or severe emotional distress; and (3) actual and proximate causation by the defendant's outrageous conduct. See, *Cervantes v. J.C. Penney Co.*, 595 P.2d 975, 983 (Cal. 1979).

Ortaliza's emotional distress claims fail due to his inability to prove the elements of the prima facie case. First, GMI's conduct can hardly be considered extreme or outrageous. It is true that Ortaliza was terminated without notice. However, GMI did offer to pay Ortaliza's salary for two months following the termination in lieu of the notice. Furthermore, he was offered a severance package which included placing Ortaliza on an unpaid leave of absence for a few years to provide him with additional retirement benefits which he would receive if he stayed with the company until he reached the age of fifty-five.

In addition, Ortaliza has not shown that he has suffered extreme or severe emotional injury. California has held that:

> when an employee suffers emotional upset on account of the employer's conduct but neither is disabled nor requires medical care, and when the employer's conduct neither contravenes public policy nor exceeds the inherent risks of the employment, the employee's injury results in no occupational impairment ... remedial by a civil action.

Hunter v. Up-Right, Inc., 864 P.2d 88, 92 (Cal. 1993).

IV

GMI asserts that this court does not have jurisdiction as to Mr. Carpenter, Ortaliza's attorney, on his appeal of the grant of attorney fees because he is not names as a party in the notice of appeal. The Supreme Court held in *Torres v. Oakland Scavenger Coo.*, 487 U.S. 312 (1988), that "[t]he failure to name a party in a notice of appeal is more than excusable 'informality'; it constitutes a failure of that party to appeal." *Id.* at 314. However, Fed. R. App. P. 3(c), the rule upon which the Court in *Torres* relied, has been amended to state that "[a]n appeal will not be dismissed . . . for failure to name a party whose intent to appeal is otherwise clear from the notice." Once we determine "it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward." Fed. R. App. P. 3(c) Advisory Committee Notes.

The Supreme Court, in adopting the amended rules, stated that the rules shall govern pending cases "insofar as just and practicable." 113 S. Ct. Preface 819 (April 22, 1993). We conclude it is just and practicable to apply the amended Rule 3(c) to this appeal. "'[I]t is important that the right to appeal not be lost by mistakes of mere form.'" *Aetna Life Ins. Co. v. Alla Medical Servs., Inc.*, 855 F.2d 1470, 1473 (9th Cir. 1988) (quoting Advisory Committee's Note to Rule 3(c)).

Another factor which the court will consider in determining if Rule 3(c) has been met is whether there is an "opportunity for confusion or prejudice." *Id.* Although Carpenter was not named as a party in the notice of appeal, his name does appear on the notice

as the appellant's attorney. Furthermore, the appeal deals with an award of attorney fees which was joint and several as to the plaintiffs and their attorney. There has been no confusion or prejudice to GMI; therefore, we hold that this court does have jurisdiction to consider Carpenter's appeal.

V

In considering the grant of attorney fees, we hold that the district court has failed to provide adequate explanations to support its conclusion that the suit is frivolous and attorney fees are warranted in this case. The absence of specific findings by the district judge does not necessarily require that we vacate the order or remand the case. We have held that if the record provides a complete understanding of the issues without the aid of separate findings, remand is not necessary. *EEOC v. Bruno's Restaurant*, 13 F.3d 285, 288 (9th Cir. 1993). After such a review in this case, however, we are unable to find adequate support for the district court's conclusion of frivolity. In fact, the conclusory statement of frivolity is inconsistent with the court's findings that, as to each cause of action, the Ortalizas failed to present "sufficient evidence" to support their claims. In examining each claim, the district court did not find that "no evidence" was presented. Nor did the district court find that any claim was frivolous.

VI

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment as to the wrongful discharge claims and emotional distress claims and we VACATE the grant of attorney fees.

AFFIRMED in part and VACATED in part.

No costs allowed.

Court stamp: FILED
July 6, 1995
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

Nos. 94-55758
94-56304
D.C. No. CV-93-06106-R
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FLORANTE ORTALIZA; LINDA ORTALIZA,	)	Nos. 94-55758, 94-56304
	)	D.C. No. CV-93-06106-R
Plaintiffs-Appellants,	)	ORDER
v.	)	
GENERAL MILLS, INC.,	)	
Defendant-Appellee.	)	

Before: FLETCHER, BRUNETTI, and T.G. NELSON, Circuit Judges.

The panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No:_____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

****

FLORANTE ORTALIZA, LINDA ORTALIZA
Petitioners

v.

GENERAL MILLS, INC.
Respondent

****

DECLARATION OF MAILING
PETITION FOR WRIT OF CERTIORARI

I, Charles H. Carpenter, say:

I am a member of the Bar of the Supreme Court of the United States. On September 22, 1995, at approximately 3:00 p.m., I deposited in the mailbox at the United States Post Office located at Glenoaks and Pacific Avenues, Glendale, California, an envelope by first class mail, addressed to the Clerk of the Supreme Court of the United States, postage prepaid, containing the original and forty (40) copies of the Petition for Writ of Certiorari in the above case.

Executed on September 22, 1995 in Glendale, California.

I declare under penalty of perjury under the laws the United States of America that the foregoing is true and correct.

Charles H. Carpenter

Charles H. Carpenter

4518-A

No._____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

****

FLORANTE ORTALIZA, LINDA ORTALIZA
Petitioners

v.

GENERAL MILLS, INC.
Respondent

****

CERTIFICATE OF SERVICE

I, Charles H. Carpenter, a member of the Bar of this Court, hereby certify that on the 22nd day of September, 1995, three (3) copies of the Petition for Writ of Certiorari in the above case were mailed, first class postage prepaid to:

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
2029 Century Park East, Ste. 3300
Los Angeles, CA 90067
Attn: Kenwood Youmans, Esq.,

counsel for the respondent herein. I further certify that all parties required to be served have been served.

Charles H Carpenter

CHARLES H. CARPENTER
ATTORNEY AT LAW
730 Omar Street
Glendale, CA 91202-2124
(818) 246-6388
Counsel for Petitioners,
FLORANTE ORTALIZA, LINDA
ORTALIZA